



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations  
of International Humanitarian Law  
Committed in the Territory of the  
former Yugoslavia since 1991

Case No.: IT-95-5/18-T  
Date: 19 May 2010  
Original: English

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**IN THE TRIAL CHAMBER**

**Before:** Judge O-Gon Kwon, Presiding Judge  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

**Registrar:** Mr. John Hocking

**Decision of:** 19 May 2010

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON THE ACCUSED'S APPLICATION FOR BINDING  
ORDER PURSUANT TO RULE 54 *BIS*  
(FEDERAL REPUBLIC OF GERMANY)**

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**Office of the Prosecutor**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Government of Germany**

via Embassy of Germany to  
The Netherlands, The Hague

**The Accused**

Mr. Radovan Karadžić

**Standby Counsel**

Mr. Richard Harvey

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “Motion for Binding Order: Government of Germany”, filed on 12 August 2009 (“Motion”), and hereby issues this decision thereon.

### **I. Background and Submissions**

1. The Accused has filed a number of motions asking the Trial Chamber to issue binding orders to various states, pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of the Rules of Procedure and Evidence (“Rules”), requesting them to disclose to him documents he claims to be relevant and necessary to his case. In the present Motion, the Accused requests the Chamber to order the Government of the Federal Republic of Germany (“Germany”) to produce the following eight categories of documents:<sup>1</sup>

- (i) All reports or memoranda concerning the suspected delivery of arms at Tuzla, Bosnia in February 1995 and efforts to conceal those deliveries, including reports made by German personnel serving in Bosnia;
- (ii) All correspondence or notes or memoranda of communications concerning the shipment of arms to Tuzla in February 1995 between the government of Germany and the United Nations (“UN”) or any of its bodies;
- (iii) All correspondence or notes or memoranda of communications concerning the shipment of arms to Tuzla in February 1995 between the government of Germany and the United States;
- (iv) All reports of the September 1995 search of offices of Third World Relief Agency (“TWRA”) in Vienna and copies of documents found therein which tend to show violations of the arms embargo by the Malaysian and Turkish UNPROFOR troops smuggling arms into Bosnia;
- (v) All information in the possession of the Germany military intelligence service or the Bundesnachrichtendienst (“BND”) concerning the delivery of arms to Bosnia in 1994 and 1995, including through flights which took off from German soil;
- (vi) All reports, minutes, or notes of the meeting of Ministers of Defence of the UK, France, and Germany and the US Secretary of Defence at Key West, Florida on 3-5 March 1995 concerning arms supplies to Bosnia;
- (vii) All reports, including reports of interviews and transcripts of depositions of testimony, and all documents received, from the investigation of the Parlamentarische Kontrollkommission concerning infiltration of UN and EU missions by BND officers, including Christoph von Bezold, and dispatch of arms to the Bosnian Army (“ABiH”), including the shipment to Bihać on 27 March 1994 of munitions disguised as humanitarian aid; and

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<sup>1</sup> Motion, para. 1.

(viii) All reports, transcripts or notes of statements made by the Accused between 9 July and 4 August 1995 about the Srebrenica events including information from signals and human intelligence.

2. The Accused submits that the Motion meets the requirements of Rule 54 *bis* because (i) he has described the categories of the documents he seeks as narrowly as possible,<sup>2</sup> and (ii) these documents are relevant to his trial. As far as their relevance is concerned, the Accused explains that the documents relating to the alleged smuggling of arms into Bosnia and Herzegovina (“BiH”), as well as their delivery to the Bosnian Muslims in the Srebrenica enclave, will be used to support his case that there was a legitimate military objective behind the Bosnian Serb operation in Srebrenica, which commenced in March 1995. They will also serve to refute the allegation that he was involved in a joint criminal enterprise (“JCE”) to eliminate the Bosnian Muslims in Srebrenica as charged in the Third Amended Indictment (“Indictment”) or that he favoured, planned, or condoned the killing of civilians in Srebrenica.<sup>3</sup> The documents concerning the provision of arms to the ABiH by personnel participating in various UN organisations will go to the allegation of hostage taking of UN personnel as they will show the “actual or perceived status [of those UN personnel] as civilians or combatants”.<sup>4</sup> The documents relating to the direct involvement of German and other international personnel in the Bosnian war “on the side of the Bosnian Muslims” will be used to challenge the credibility and reveal the bias of the Prosecution’s international witnesses.<sup>5</sup> Finally, the documents regarding the Accused’s statements about Srebrenica will go towards rebutting the allegation of his participation in the JCE mentioned above.<sup>6</sup>

3. The Accused argues that Germany is in possession of the requested documents and bases his claims on a book titled “Intelligence and the War in Bosnia 1992–1995”, which was written by Cees Wiebes as part of a larger report on the events in Srebrenica commissioned by the Dutch Government and published by the Netherlands Institute for War Documentation in 2002, as well as some news articles.<sup>7</sup> Finally, the Accused submits that prior to the filing of the Motion he sent two letters to Germany requesting copies of a number of documents, including the documents listed above; however, Germany refused to provide them.<sup>8</sup>

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<sup>2</sup> Motion, paras. 19, 21–22.

<sup>3</sup> Motion, para. 25.

<sup>4</sup> Motion, para. 26.

<sup>5</sup> Motion, para. 27.

<sup>6</sup> Motion, para. 24.

<sup>7</sup> Motion, paras. 2–13.

<sup>8</sup> Motion, para. 30. Annexes A, B.

4. Having been invited to respond, and given an extension of time in which to do so, Germany filed, on 25 September 2009,<sup>9</sup> an “Answer to the Request for Motion for a Binding Order to be issued to the Government of the Federal Republic of Germany for the Production of Documents pursuant to Rule 54 *bis*” (“Response”), opposing the Motion in relation to categories (i) to (vii) of the requested documents on the grounds that those documents do not meet the requirements of Rule 54 *bis*, particularly the criteria of relevance and necessity.<sup>10</sup> Specifically, Germany argues that the documents in relation to the smuggling of arms are neither relevant nor necessary because (i) none of the requested documents goes to the transportation of arms to Srebrenica but instead relates only to the smuggling of arms to Tuzla and Bihać, and (ii) the fact that arms were smuggled into Srebrenica does not refute the charge of genocide against the Accused.<sup>11</sup> Germany also submits that none of the documents described in categories (i) to (vii) of the Motion has any relevance to Count 11 of the Indictment, namely taking UN personnel hostage, because the offence of taking hostages under Article 3 of the Statute does not depend on the status of UN personnel as civilians or combatants.<sup>12</sup> Finally, Germany submits that the Accused’s argument in relation to challenging the credibility of unidentified international witnesses is not relevant to “any matter in issue in the proceedings” as prescribed in Rule 54 *bis* (B)(i).<sup>13</sup> As far as category (viii) of the requested documents is concerned, Germany agreed to examine whether it was in possession of any such documents.<sup>14</sup> On 13 October 2009, Germany filed a “Note Verbale”, indicating that it was not.<sup>15</sup>

5. Germany further argues that, insofar as the documents might belong to the German intelligence services, the publication of which would prejudice Germany’s national security interests, a proceeding pursuant to Rule 54 *bis* (F) and (G) would be necessary. Furthermore, it claims that it is not “obliged” to disclose any documents which originate from a third state, without the consent of that state.<sup>16</sup>

6. On 28 September 2009, the Accused filed a “Motion for Leave to Reply and Reply Brief: Binding Order to Germany” (“Reply”), in which he argues that Germany does not have the standing to challenge the relevance of the documents requested in the Motion.<sup>17</sup> He notes that he is prepared to agree to the application of protective measures which may be requested by Germany in

<sup>9</sup> Invitation to the Federal Republic of Germany, 14 August 2009; Decision on Request from the Federal Republic of Germany, 24 August 2009.

<sup>10</sup> Response, paras. 1, 5, 16.

<sup>11</sup> Response, para. 7.

<sup>12</sup> Response, para. 8–9.

<sup>13</sup> Response, para. 11.

<sup>14</sup> Response, paras. 12–13.

<sup>15</sup> Note Verbale, 13 October 2009.

<sup>16</sup> Response, paras. 14–15.

<sup>17</sup> Reply, para. 4.

order to protect the documents in question.<sup>18</sup> With respect to the issue of the ownership of the documents by other states, he asks that Germany either obtain permission to disclose the documents to him from those states or, in the alternative, to provide him with the specific information which would enable him to request the production of the documents from the originating state.<sup>19</sup>

7. On 6 November 2009, having been invited to do so by the Chamber,<sup>20</sup> the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Submission (Motion for Binding Order: Government of Germany)” (“Prosecution Submission”) in which it asserts that it does not consider categories (i) to (vii) of the documents requested in the Motion to be relevant or necessary to the present case as required by Rule 54 *bis*. This is because the Prosecution does not dispute that, even after the Srebrenica enclave was supposedly demilitarised and declared a “safe area”, arms were smuggled into it, and the Bosnian Muslim forces within the enclave would launch attacks on the Bosnian Serb forces and villages.<sup>21</sup> In addition, the Prosecution also states that the determination of Count 11 and whether UN personnel were held hostage does not depend upon whether they were civilians or combatants, and to that extent the requested documents are not relevant. The Prosecution also notes that insofar as the status of hostages “may form a part of overall consideration of the manner in which and the reasons why they were held,” the Accused did not seek documents which relate to any alleged activities of those specific persons, but rather to activities of “other UN personnel”.<sup>22</sup> Finally, the Prosecution submits that the Accused has failed to show that the requested documents pertain to the credibility of any particular witness.<sup>23</sup>

8. The Trial Chamber announced at the Status Conference held on 28 January 2010 that a hearing pursuant to Rule 54 *bis* would be held on 15 February 2010 (“Hearing”).<sup>24</sup> In its “Order Scheduling a Hearing Pursuant to Rule 54 *bis*”, the Chamber invited, *inter alia*, representatives of Germany to attend the Hearing and informed Germany that it could file a notice of objection, pursuant to Rule 54 *bis* (F) not less than five days beforehand.<sup>25</sup> Thus, on 10 February 2010, Germany filed a submission in which it reiterated its position in relation to categories (i) to (vii) requested in the Motion, and asked that, in case the Chamber decides to grant the Motion, it be allowed a reasonable period of time to assess which documents will raise national security concerns, and that it also be granted the “precautionary procedural assurance” set out in Rule 54 *bis*

<sup>18</sup> Reply, para. 6.

<sup>19</sup> Reply, para. 7.

<sup>20</sup> Invitation to the Prosecution (Motion for Binding Order: Government of Germany), 22 October 2009.

<sup>21</sup> Prosecution Submission, paras. 2–3.

<sup>22</sup> Prosecution Submission, para. 4.

<sup>23</sup> Prosecution Submission, para. 5.

<sup>24</sup> Status Conference, T. 710 (28 January 2010).

<sup>25</sup> Order Scheduling a Hearing Pursuant to Rule 54 *bis*, 29 January 2010.

(F).<sup>26</sup> It also reaffirmed its position about “the documents which are based upon information from third states.”<sup>27</sup>

9. During the Hearing, and contrary to his earlier position,<sup>28</sup> the Accused stated that he did not object to the Trial Chamber hearing arguments from Germany on the relevance of the documents requested.<sup>29</sup> Accordingly, representatives of Germany again reiterated Germany’s previous position and added that the documents which relate to categories (i) to (vii) set out in the Motion “pertain to national security interest or to the protection of third states”.<sup>30</sup> Furthermore, should the Chamber grant the Motion, the scope of disclosure should be limited to the material concerning “the actual deeds” of the Accused.<sup>31</sup> In respect of category (vii) of the documents requested, the German representatives stated that the German Parliament has indicated that “no [such] documents have ever existed, and that, if possible, there may only be a sort of result of an internal discussion ever put on paper, and that, of course, is to be seen as strictly confidential”.<sup>32</sup> The German representatives also indicated that the Parlamentarische Kontrollkommission will convene within six to eight weeks to deal with this request again.<sup>33</sup>

10. At the Hearing the Prosecution reiterated its previous submission in relation to Srebrenica and added that it does not dispute that the “military forces” in the Srebrenica enclave were a legitimate military target.<sup>34</sup> The Prosecution also submitted that some of the documents requested by the Accused in his various binding orders motions had already been disclosed to him by the Prosecution itself.<sup>35</sup> Accordingly, the Trial Chamber ordered the Prosecution to file a submission indicating which of the documents disclosed to the Accused by it fell into the categories of documents requested by him from various states, including Germany.<sup>36</sup> Thus, on 24 February 2010, the Prosecution filed a submission (“Prosecution’s Second Submission”) indicating that it had already disclosed to the Accused documents which relate to categories (iv) and (vi) of the Motion.<sup>37</sup> The Prosecution also submitted that it was not able to conduct a “meaningful search” for

<sup>26</sup> Submission from Germany entitled “Order Scheduling a Hearing Pursuant to Rule 54 *bis* Objections According to Rule 54 bis (F)”, 10 February 2010 (“Germany’s Submission”), paras. 1–4.

<sup>27</sup> Germany’s Submission, para. 5.

<sup>28</sup> See *supra*, para. 6.

<sup>29</sup> Hearing, T. 752 (15 February 2010).

<sup>30</sup> Hearing, T. 754 (15 February 2010).

<sup>31</sup> Hearing, T. 755, 766–767 (15 February 2010).

<sup>32</sup> Hearing, T. 760–761 (15 February 2010).

<sup>33</sup> Hearing, T. 754 (15 February 2010).

<sup>34</sup> Hearing, T. 762–763 (15 February 2010).

<sup>35</sup> Hearing, T. 776–777 (15 February 2010).

<sup>36</sup> Hearing, T. 777–778 (15 February 2010).

<sup>37</sup> Prosecution’s Second Submission, para. 2, Confidential Appendix A, pp. 18–19.

documents related to category (viii) because the description was too broad; however it did provide 16 intercepted telephone conversations which relate to that request.<sup>38</sup>

11. Following an order issued by the Chamber to respond to the Prosecution's Second Submission,<sup>39</sup> the Accused filed his "Submission on Request to Government of Germany" on 11 March 2010 ("Accused's Submission") in which he withdrew categories (iv) and (vi) from the Motion on the basis of the provision of material by the Prosecution and two other states.<sup>40</sup>

## **II. Applicable Law**

12. Article 29 of the Statute obliges states to "co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." This obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] ... the service of documents."<sup>41</sup>

13. In addition, Rule 54 *bis* enables a party to request a Chamber to issue an order to a state for the production of documents or information. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely, (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents;<sup>42</sup> (ii) the requested documents must be "relevant to any matter in issue" and "necessary for a fair determination of that matter" before a Chamber can issue an order for their production;<sup>43</sup> (iii) the applicant must show that he made a reasonable effort to persuade the

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<sup>38</sup> The 16 intercepts are as follows: Rule 65 *ter* numbers 32446, 30923, 32447, 31158, 32453, 32454, 32462, 31697, 31502, 32464, 32468, 32469, 32473, 32480, 30445, and 31036. Prosecution's Second Submission, para. 2, Confidential Appendix A, p. 20.

<sup>39</sup> Order for Response, 3 March 2010.

<sup>40</sup> Accused's Submission, paras. 3–4.

<sup>41</sup> Article 29(2)(c) of the Statute.

<sup>42</sup> *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006 ("*Milutinović* US Decision"), paras. 14–15; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Review"), para. 32; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108*bis*, 9 September 1999 ("*Kordić* Decision"), paras. 38–39.

<sup>43</sup> Rule 54 *bis* (A)(ii) of the Rules; *Blaškić* Review, paras. 31, 32(ii); *Kordić* Decision, para. 40; *Milutinović* US Decision, paras. 21, 23, 25, 27.

state to provide the requested information voluntarily,<sup>44</sup> and (iv) the request cannot be unduly onerous upon the state.<sup>45</sup>

14. With respect to (i) above, the Appeals Chamber has held that “a category of documents may be requested as long as it is defined with sufficient clarity to enable ready identification by a state of the documents falling within that category”.<sup>46</sup> If the requesting party is unable to specify the title, date, and author of the requested documents, but provides an explanation and is able to identify the requested documents in some appropriate manner, a Trial Chamber may, in consideration of the need to ensure a fair trial, allow the omission of those details if “it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing those particulars”.<sup>47</sup>

15. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.<sup>48</sup> In determining whether the documents sought by an applicant are relevant, Chambers have considered criteria such as whether they relate to the “most important” or “live” issues in the case,<sup>49</sup> or whether they relate to the “defence of the accused”.<sup>50</sup> As for the necessity requirement, it obliges the applicant to show that the requested materials are necessary for a fair determination of a matter at trial. The applicant need not make an additional showing of the actual existence of the requested materials, but is only required to make a reasonable effort before the Trial Chamber to demonstrate their existence.<sup>51</sup> Furthermore, the applicant is not required to make a showing that all other possible avenues have been exhausted but simply needs to demonstrate “either that: [he or she] has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or that the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54 *bis* order.”<sup>52</sup>

16. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A) (iii)

<sup>44</sup> Rule 54 *bis* (A) (iii) of the Rules; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić Amended Rule 54 *bis* Application, 29 September 2006 (“*Sreten Lukić* Decision”), para.7.

<sup>45</sup> *Blaškić* Review, para. 32 (iii); *Kordić* Decision, para. 41.

<sup>46</sup> *Milutinović* US Decision, para. 15; *Blaškić* Review, para. 32; *Kordić* Decision, para. 39.

<sup>47</sup> *Blaškić* Review, para. 32.

<sup>48</sup> *Kordić* Decision, para. 40.

<sup>49</sup> See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Second Application of General Ojdanić for Binding Orders pursuant to Rule 54*bis*, 17 November 2005 (“*Second Ojdanić* Decision”), paras. 21, 25; *Prosecutor v. Milutinović et al.*, Separate and concurring opinion of Judge Iain Bonomy in the Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 23 March 2005.

<sup>50</sup> See e.g., *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Requests by the Accused for Trial Chamber II to issue Subpoena Orders, 3 June 2005, p. 4; *Sreten Lukić* Decision, para. 13.

<sup>51</sup> *Milutinović* US Decision, para. 23.

<sup>52</sup> *Milutinović* US Decision, para. 25.



requires the applicant to explain the steps that have been taken to secure the state's co-operation. The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily.<sup>53</sup> Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.<sup>54</sup>

17. With regard to (iv) above, the Appeals Chamber has held that “the crucial question is not whether the obligation falling upon States to assist the Tribunal in the evidence collecting process is onerous, but whether it is unduly onerous, taking into account mainly whether the difficulty of producing the evidence is not disproportionate to the extent that process is strictly justified by the exigencies of the trial”.<sup>55</sup>

### **III. Discussion**

#### **A. Leave to reply**

18. With respect to the Accused's Reply, the Chamber considers that he has addressed issues raised in the Response, which are additional to the matters he discusses in his Motion. Therefore, the Chamber will grant the Accused leave to reply to Germany's Response, and will accept the already-filed Reply.

#### **B. Relevance and necessity**

19. The Chamber notes that the Motion does not discuss separately the relevance of each category of documents requested. Rather, the Accused groups the categories and submits that the documents requested are relevant because they go to four different issues in his case. The Chamber will, therefore, first consider whether the four issues are indeed relevant to the Accused's case, and then, should that be so, will proceed to consider each category of the requested documents in order to determine if the Accused has met the requirements of Rule 54 *bis* for each one.

20. The Accused's first argument is that the documents relating to the smuggling of arms into BiH and their delivery onwards to Srebrenica are relevant as they will show that (i) the operations conducted by the Bosnian Serbs in Srebrenica had a legitimate military objective, and (ii) the

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<sup>53</sup> *Sreten Lukić* Decision, para.7.

<sup>54</sup> *Milutinović* US Decision, para. 32.

<sup>55</sup> *Kordić* Decision, para. 38; *Blaškić* Review, para. 26.

Accused was not involved in the alleged JCE to eliminate the Bosnian Muslims in Srebrenica. The Chamber recalls that the Indictment against the Accused alleges that, in March 1995, he implemented a plan to take over the Srebrenica enclave and forcibly transfer and/or deport its Bosnian Muslim population with a view to permanently removing them from the area. The Indictment further alleges that Bosnian Serb forces attacked Srebrenica on 6 July 1995 and that, within days of that attack, the Accused formed the shared objective to eliminate the Bosnian Muslims in Srebrenica by killing the men and forcibly displacing the women and children.<sup>56</sup> The Accused's case, on the other hand, appears to be that the Bosnian Muslims in Srebrenica were heavily armed rather than disarmed, and that they were launching "very violent" attacks on the Bosnian Serbs from the enclave. Thus, according to the Accused, the attack on 6 July had a legitimate military objective and, as a result, he had neither the intent to eliminate the Bosnian Muslims from the area nor to kill them.<sup>57</sup>

21. The Chamber considers that the Accused's state of mind, when it comes to events in Srebrenica, is a live issue between the parties that goes to the crux of a number of charges against him. In addition, as stated in the previous paragraph, the genocide charge against the Accused is not the only charge in relation to Srebrenica. He also allegedly committed various underlying offences of crimes against humanity, such as persecution, extermination, murder, deportation, and inhumane acts.<sup>58</sup> Given that one of the general requirements of crimes against humanity is that there be an attack on a predominantly civilian population, whether the enclave was demilitarised or was in fact heavily armed in 1995 is relevant to these underlying offences, and thus to the Accused's case. Accordingly, the Chamber considers, by majority, Judge Kwon dissenting, that any documents that may go to this issue may also be relevant to the present case.

22. The Chamber acknowledges that the Prosecution does not deny that (i) even after the Srebrenica enclave was declared a safe area, it was not demilitarised, (ii) the "Muslim forces" within the enclave launched attacks against the Bosnian Serb forces and villages, and (iii) "the military forces" in the Srebrenica enclave were legitimate military targets.<sup>59</sup> However, the Prosecution also alleges that the attack on Srebrenica included the shelling of civilians and civilian targets in the enclave.<sup>60</sup> Indeed, this allegation is central to the Prosecution's more general charge that crimes against humanity were committed by the Accused. Thus, despite the Prosecution's concession above, the extent to which the "military forces" were present and armed in the enclave,

<sup>56</sup> Indictment, paras. 8, 20–24, 42–47. *See also* Prosecution Pre-Trial Brief, paras. 193–207.

<sup>57</sup> Hearing, T. 763–764 (15 February 2010).

<sup>58</sup> Counts 3, 4, 5, 7, and 8 of the Indictment. *See also* Prosecution Pre-Trial Brief, para. 194.

<sup>59</sup> *See supra* paras. 7, 10; *see also* Prosecution Pre-Trial Brief, paras. 195, 202.

<sup>60</sup> Indictment, para. 88; Prosecution Pre-Trial Brief, para. 206.

as well as the extent to which male civilians also present there were armed, if at all, remains uncertain at this stage of the case. Accordingly, the Chamber considers by majority, Judge Kwon dissenting, that documents related to the smuggling of arms to Srebrenica are necessary for the determination of the Accused's state of mind in July 1995, as well as to the Chamber's determination of the general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with responsibility. The fact that the documents requested in the Motion pertain to the smuggling of arms to Tuzla and Bihać, and do not explicitly mention their delivery to Srebrenica, does not alter the majority's view. It is conceivable that the Accused will need these documents, which are essentially concerned with the quantity of, and the way in which, the arms were allegedly smuggled into Srebrenica, in order to provide the Chamber with credible arguments relating to the extent to which the inhabitants of Srebrenica were armed and the enclave was demilitarised.

23. In respect of the Accused's argument that the documents concerning the provision of arms to the ABiH by UN personnel are relevant to his case as they will shed light on the status of the UN personnel detained by the Bosnian Serbs, the Chamber recalls that the Indictment alleges that he participated in a JCE to take hostages in order to compel the North Atlantic Treaty Organisation ("NATO") to abstain from conducting air strikes against Bosnian Serb military targets. It further alleges that between approximately 26 May and 19 June 1995, Bosnian Serb forces detained over two hundred UN peacekeepers and military observers in various locations, that threats were issued to third parties, including NATO and UN commanders, that further attacks on Bosnian Serb military targets would result in the injury, death or continued detention of the detainees, and that some detainees were assaulted or maltreated during their captivity. The Indictment charges the Accused with "taking of hostages" as a violation of the laws or customs of war, as recognised by Common Article 3(1)(b) of the Geneva Conventions of 1949, and punishable under Article 3 of the Statute, and it indicates that the victims of this offence were persons "taking no active part in hostilities".<sup>61</sup> The Accused's case, on the other hand, is that rather than preventing NATO from bombing, the real reason behind the detention of these UN personnel was the fact that UN personnel in general were involved in arms smuggling, supporting the Bosnian Muslim side, and that by virtue of this involvement they ceased to have civilian status.<sup>62</sup>

24. The Chamber recalls Germany's submission that the offence of "taking of hostages" under Article 3 of the Statute does not depend upon whether the hostages are civilians or combatants, but rather upon whether there is a threat of force against them in order to make a third party behave in a

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<sup>61</sup> Indictment, paras. 8, 25–29, 83–87, 90.

<sup>62</sup> Hearing, T. 758–759 (15 February 2010).

certain way.<sup>63</sup> In that context, the Chamber also refers to the Prosecution's submission that (i) whether or not the UN personnel were held as hostages does not depend on whether they were civilians or combatants, and (ii) if the determination of the offence of hostage-taking depends upon the manner in which and the reasons why they were held, the requested documents are irrelevant to the case because they do not appear to relate to specific UN personnel taken hostage.<sup>64</sup>

25. The Chamber first notes that, as partly acknowledged by the Prosecution in (ii) above, the Accused's argument in relation to this issue is not concerned only with the status of the UN personnel detained. Rather, it also relates to the allegations about the reasons behind the detentions, including his own state of mind, which is a live issue in this case and is relevant to the Accused's defence.

26. The Chamber also recalls its "Decision on Six Preliminary Motions Challenging Jurisdiction" issued on 28 April 2009 ("Decision on Jurisdiction"), in which it briefly dealt with this issue in the context of the Accused's purported jurisdictional challenge to Count 11. The Chamber, while ruling that the issues raised by the Accused there were issues going to the form of the Indictment rather than jurisdiction, noted as follows:

[O]n its face common article 3 [of the Geneva Conventions] not only prohibits the taking of civilian hostages, but also of others who are "taking no active part in the hostilities". However, whether as argued by the Accused, the victims of hostage-taking must be civilians, or must be detained unlawfully, are questions going to the elements of the crime.<sup>65</sup>

The Chamber then noted that "persons taking no active part in hostilities" included those who were placed *hors de combat* by virtue of their detention and that the UN personnel mentioned in Count 11 could fall into that category.<sup>66</sup> In addition, the Chamber also noted that the unlawfulness of detention "does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the manner in which, and *reasons why, they are held.*"<sup>67</sup> Thus, despite the fact that Germany and the Prosecution submit that the status of UN personnel is not relevant to the determination of this allegation, the Chamber's statement outlined above clearly indicates that whether or not UN personnel actively participated in hostilities might be an issue in this case.

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<sup>63</sup> Response, paras. 8–9.

<sup>64</sup> Prosecution Submission, para. 4.

<sup>65</sup> Decision on Jurisdiction, para. 58. The Appeals Chamber upheld the Trial Chamber on this point. *See* Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment.

<sup>66</sup> Decision on Jurisdiction, para. 60.

<sup>67</sup> Decision on Jurisdiction, para. 65 [Emphasis added].

27. It is also important to note here that the specific elements of this offence under Article 3 of the Statute are yet to be addressed by this Tribunal. Thus, the Chamber will first have to make its determination on what the precise elements of hostage-taking under Article 3 are, and will then have to look at all the circumstances surrounding the alleged hostage-taking in order to determine whether those elements have been fulfilled. In the majority's view, Judge Kwon dissenting, these circumstances might include the Accused's state of mind in relation to this allegation and the question of whether arms smuggling, if proven, could potentially turn UN personnel into active participants in the hostilities. Furthermore, it is the majority's view that the documents sought also go to what Germany admits *is* relevant, namely to whether there was a threat of force against the UN personnel detained *in order to make a third party, in this case NATO, behave in a certain way*. Accordingly, the Chamber, by majority, considers that the issue of UN personnel's involvement in arms smuggling bears relevance to the Accused's case.

28. As to the Accused's argument that the documents he requests are relevant to challenging the credibility and revealing the bias of international witnesses who are to be called by the Prosecution, the Chamber understands this argument to be that the documents are relevant to and necessary for the preparation of his cross-examination. While it may be possible to argue that the relevance of certain documents is established because they are necessary for preparation of cross-examination of certain witnesses, in the Chamber's view this can be done only if the applicant provides information regarding the specific witnesses to which the requested information will relate, the issues that these witnesses will be cross-examined on, and an explanation of how this cross-examination will affect the applicant's case. However, the Accused made no attempt to identify any of these matters. Accordingly, the Chamber is not satisfied that the Accused has adequately satisfied the requirement of relevance here. Indeed, the Chamber is even unable to verify which of the categories of documents requested in the Motion relate to the Accused's purpose of challenging the credibility of international witnesses.

29. Finally, the Chamber considers that any statements made by the Accused between 9 July and 4 August 1995 about the Srebrenica enclave are clearly relevant to this case. They are also necessary for a fair determination of the case and the Accused's defence as they may reveal the Accused's state of mind during the events in Srebrenica in 1995.

30. The Chamber notes here that its determination that some of the issues discussed above bear relevance to the Accused's case does not necessarily mean that any or all documents that may eventually be obtained by the Accused in relation to those issues will be admitted by the Chamber into evidence. As with any other material, the Accused will have to persuade the Chamber that

each particular document is relevant to his case and also that it satisfies the other requirements of Rule 89 of the Rules before it could be admitted.

**C. Specific categories of documents**

31. The Chamber will now proceed to analyse whether categories (i) to (iii), (v), (vii) and (viii) of the documents requested in the Motion meet the requirements of Rule 54 *bis*. Based on its general findings above as to the issues that are relevant to the determination of the Accused's case, the Chamber will consider whether each individual category of documents relates to any of those issues and otherwise satisfies the requirements of Rule 54 *bis*.

32. The Chamber recalls, as described above in the background and submissions section, that prior to the filing of the Motion, the Accused contacted Germany privately but Germany declined his request to provide the documents listed in the Motion. It has continued to do so ever since. The Chamber is, therefore, satisfied that the Accused has made a reasonable effort to persuade the state to provide the requested information voluntarily.

33. The Chamber also considers that the Accused has made a reasonable effort to demonstrate the existence of the documents requested. It is also satisfied that he has exercised due diligence in obtaining the requested documents from the Prosecution or from other states, but has been unable to do so.

34. As far as the specific documents described in category (i) are concerned, the Trial Chamber finds them, by majority, Judge Kwon dissenting, relevant and necessary to the Accused's defence for the reasons discussed above in paragraphs 20 to 27. The Chamber also finds that they are described with sufficient specificity as the Accused has noted the general topic to which the documents are related and has also limited his request both temporally (to February 1995) and geographically (Tuzla). The search for these documents would, therefore, not be unduly onerous for Germany. Accordingly, the Chamber, by majority, is of the view that the documents sought under category (i) of the Motion meet the requirements of Rule 54 *bis*.

35. With respect to the documents described in category (ii), the Trial Chamber finds, by majority, Judge Kwon dissenting, that they are relevant to and necessary for the Accused's defence as discussed in paragraphs 20 to 27 above. The Chamber also considers that this category describes the documents with sufficient specificity as they are limited geographically (Tuzla) and temporally (February 1995), and the Accused notes the general topic to which they relate. Thus, the search for these documents should not be unduly onerous for Germany. Accordingly, the Chamber, by

majority, is of the view that documents sought under category (ii) of the Motion meet the requirements of Rule 54 *bis*.

36. Concerning the documents described in category (iii), the Trial Chamber first finds, by majority, Judge Kwon dissenting, that they are relevant to and necessary for the Accused's defence as discussed in paragraph 20 to 27 above. Furthermore, it is also satisfied that the Accused has defined the category with sufficient specificity by indicating the subject matter, the limited time period (February 1995), the geographical location (Tuzla), and the parties involved in the documents sought. Thus, conducting this search should not be unduly onerous for Germany. For those reasons, the Chamber, by majority, is of the view that the Accused's request under category (iii) of the Motion satisfies the requirements of Rule 54 *bis*.

37. As far as category (v) is concerned, the Chamber is not convinced that it is specific enough for the purposes of Rule 54 *bis*. The Accused wants "all information" in possession of the German military intelligence concerning the delivery of arms to BiH in 1994 and 1995. Unlike the requests above, this category covers a broad period of two years (including possibly the period after August 1995) and does not provide a specific geographical location to which arms were smuggled. This lack of specificity, in turn, also has an effect on the relevance requirement as the Chamber finds it difficult to see how the general delivery of arms in, for example, the very end of 1995, bears any relevance to the events in Srebrenica. Furthermore, due to the way in which this category is phrased, the Chamber also finds it difficult to see how it could be relevant to the involvement of UN personnel in arms smuggling. Finally, given this lack of relevance and specificity, the Chamber considers that attempting a search for these documents would be overly burdensome for Germany.<sup>68</sup>

38. With respect to the documents described in category (vii), the Chamber does not view the first part of the request, namely the reference to the documents relating to "infiltration of UN and EU Missions by BND officers, including Christoph von Bezold" as relevant *per se* to any of the issues deemed to be live in this case. Whether or not these officers infiltrated certain international organisations is not, on its own, relevant to the issue of the arming of Bosnian Muslims in Srebrenica, nor does it go to the allegations relating to hostage taking. What is relevant is the part of the request dealing with the alleged dispatch of ammunition to Bihać on 27 March 1994, which was allegedly disguised as humanitarian aid. In this context, the Chamber also adds that the Indictment charges the Accused with participating in a JCE to permanently remove Bosnian

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<sup>68</sup> Judge Kwon appends a separate opinion on the issue of relevance of documents sought in category (v). See Partially Dissenting Opinion of Judge Kwon, para. 8.

Muslims and Bosnian Croats from the territories of BiH, including through forcible transfer, and alleges that he directed and authorised the restriction of humanitarian aid to Bosnian Muslim and Bosnian Croat enclaves, including the Srebrenica enclave, in an effort to make life impossible for their inhabitants.<sup>69</sup> Accordingly, any documents received from the investigation of the Parlamentarische Kontrollkommission relating to the 27 March 1994 dispatch of ammunition to Bihać are relevant to this case, in accordance with paragraphs 20 to 27 above,<sup>70</sup> as well as in relation to the allegations relating to restrictions of humanitarian convoys. The Chamber also notes that by indicating the specific subject of the investigation conducted by the German authorities, the body conducting it, and the relevant date and the geographical location of the dispatch, the Accused has defined category (vii) of the request with sufficient clarity to enable Germany to search for the relevant documents.<sup>71</sup> Accordingly, it will not be unduly onerous for Germany to conduct this search.

39. As far as the documents described in category (viii) are concerned, the Chamber finds that, as discussed in paragraph 29 above, they are relevant to and necessary for the Accused's defence. Furthermore, given that the Accused provides specific dates and has limited the subject of his statements to the events in Srebrenica, this category is specific enough to enable a productive search. Indeed, Germany did conduct such a search and informed the Chamber that it was not in possession of any such documents.<sup>72</sup> Taking into account the fact that the Accused concedes that he does not have any substantial evidence to support his position that Germany is in possession of these documents,<sup>73</sup> and that, as claimed by the Prosecution, he was provided with a number of intercepted telephone conversations which relate to that request, the Chamber finds that Germany should not be ordered to conduct a further search for these documents, without any additional specification from the Accused pointing to particular information in Germany's possession.

40. Accordingly, for all the reasons above, the Chamber finds that Germany shall search for documents described in categories (i), (ii), (iii), and (vii),<sup>74</sup> and produce the documents found, if any, to the Accused.

<sup>69</sup> Indictment, paras. 9–14, 68–70, 74.

<sup>70</sup> Judge Kwon, in his partially dissenting opinion, does not agree that the documents sought in category (vii) are relevant to this case insofar as they may go to the issues of smuggling of arms into Srebrenica and the involvement of UN personnel in it. *See* Partially Dissenting Opinion, para. 12 and footnote 15.

<sup>71</sup> Insofar as this category could be interpreted broadly, that is, as referring to documents from the Parlamentarische Kontrollkommission which go to the dispatch of arms to ABiH *in general*, the Chamber considers it to be too broad, as it provides no relevant dates or geographical locations. Thus, the Chamber will narrow down this category to the Bihać shipment alone.

<sup>72</sup> *See supra*, para. 4.

<sup>73</sup> Hearing, T. 757–758 (15 February 2010).

<sup>74</sup> Bearing in mind that category (vii) has been narrowed down by the Chamber in para. 38 above.



#### **D. National security interest and protection of third states**

41. As set out above, Germany argues that some of the documents requested by the Accused may raise national security concerns. The Trial Chamber first notes that a state does not have a blanket right to withhold the production of documents on the basis that this raises national security concerns. As held by the Appeals Chamber, if states were able to “unilaterally assert national security claims and refuse to surrender those documents,” this could jeopardise “the very function of the International Tribunal, and ‘defeat its essential object and purpose.’”<sup>75</sup> However, the Rules do not leave the concerned states without any alternative because their concerns may be addressed by recourse to Rule 54 *bis* (F) to (I), which provide for various protective measures for the documents at issue, should they be requested.

42. Germany also argues that some of the materials sought are based upon information from third states and thus cannot be disclosed to the Accused without the permission of those states. With regard to the information that originates from and/or is owned by third states or organisations, the Appeals Chamber has held that a state in possession of such information should not be forced to disclose it as it has “a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other states and entities”; if that state “were to divulge the information without the consent of the information providers, other states could start doubting [that state’s] willingness and ability to keep secrets entrusted to it”.<sup>76</sup> The Appeals Chamber further held that the “application of protective measures to this information handed-over by [the state in possession] would clearly not suffice to protect this national security interest.”<sup>77</sup>

43. It appears to the Chamber that Germany’s arguments in relation to both its national security interests and information belonging to third states were based on the general assumption that the requested documents might raise national security or ownership issues, rather than specific knowledge of which particular document, if any, would be so affected. Given that Germany now knows exactly which categories of documents it should search for and produce to the Accused, it should provide the Chamber with specific arguments relating to its national security interest or protection of third states, with a reference to the specific documents affected. Bearing in mind that states cannot simply refuse to produce documents on the basis of national security interests, Germany’s objection should also contain an indication of whether it requests any protective

<sup>75</sup> *Blaškić* Review, para. 65.

<sup>76</sup> *Milutinović* US Decision, paras. 43–44; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006 (“*Milutinović* NATO Decision”), para. 19.

<sup>77</sup> *Milutinović* US Decision, para. 44; *Milutinović* NATO Decision, para. 19.

measures for particular documents. As for the issue of third state ownership, Germany should indicate to the Chamber which particular documents are owned by third states and thus cannot be disclosed to the Accused without that state's permission.

#### **IV. Disposition**

44. For the reasons above, the Trial Chamber, pursuant to Article 29 of the Statute, and Rules 54, 54 *bis*, and 126 *bis* of the Rules, hereby

- (i) **GRANTS** leave to the Accused to reply to Germany's Response, and accepts the already submitted Reply.
- (ii) **GRANTS** the Motion **IN PART** and **ORDERS** as follows:
  - (a) Germany shall search for the documents requested by the Accused in categories (i), (ii), and (iii), outlined in paragraph 1 above, as well as category (vii), as narrowed down by the Chamber in paragraph 38 above, and shall deliver them to the Accused by 18 June 2010;
  - (b) Germany shall indicate, by 8 June 2010, which of the documents ordered to be produced are affected by national security concerns, and which of those relate to the protection of third states or organisations, and shall, if it deems it to be necessary, make objections and/or request protective measures with a reference to specific documents affected.
- (iii) **DENIES** the Motion in all other respects.

Judge Kwon appends a partially dissenting opinion to this decision.

Done in English and French, the English text being authoritative.




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Judge O-Gon Kwon,  
Presiding

Dated this nineteenth day of May 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

## PARTIALLY DISSENTING OPINION OF JUDGE KWON

1. The majority finds that documents relating to the issue of smuggling of arms to BiH and their onward delivery to Srebrenica and the issue of UN personnel's involvement in arms smuggling are relevant to and necessary for the Accused's case.<sup>1</sup> On that basis, the majority orders Germany to provide documents described in categories (i) to (iii) set out in the Motion to the Accused.<sup>2</sup> However, I respectfully disagree with the majority's conclusion granting the Accused's motion in relation to these documents, because, in my view, they are neither relevant to nor necessary for the determination of the issues in this case. Further, while I agree with the majority in granting the Accused's Motion in relation to the documents described in the latter part of category (vii)<sup>3</sup> and in denying the Accused's Motion in relation to the documents described in category (v),<sup>4</sup> I respectfully depart from the majority's reasoning in part.

2. The majority first recalls the Accused's argument that the documents relating to the smuggling of arms into BiH and their delivery onwards to Srebrenica are relevant as they will show that (i) the operations conducted by the Bosnian Serbs in Srebrenica had a legitimate military objective, and (ii) the Accused was not involved in the alleged JCE to eliminate the Bosnian Muslims in Srebrenica. Considering that the Accused's state of mind about the events in Srebrenica is a live issue between the parties, and that whether the Srebrenica enclave was demilitarised or in fact heavily armed in 1995 is relevant to the crimes against humanity the Accused is charged with, which requires that there be an attack on a predominantly civilian population, the majority concludes that any documents that may go to the smuggling of arms to BiH and their onwards delivery to Srebrenica may be relevant to the present case.<sup>5</sup>

3. The majority acknowledges that the Prosecution does not deny that (i) even after the Srebrenica enclave was declared a safe area, it was not demilitarised, (ii) the "Muslim forces" inside the enclave launched attacks against the Bosnian Serb forces and villages, and (iii) "the military forces in the Srebrenica enclave were legitimate military targets". However, the majority finds that, given that the Prosecution's allegation also includes the shelling of civilians and civilian targets in the enclave, despite the above concession by the Prosecution, the extent to which "military forces" were present and armed in the enclave, as well as the extent to which male

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<sup>1</sup> See *supra* paras. 20–27.

<sup>2</sup> See *supra* paras. 34–36.

<sup>3</sup> See *supra* para. 38.

<sup>4</sup> See *supra* para. 37.

<sup>5</sup> See *supra* paras. 20–21.

civilians residing there were armed, if at all, remains uncertain at this stage of the case. The majority then concludes that the documents related to the smuggling of arms to Srebrenica may be necessary for the determination of the Accused's state of mind in July 1995, as well as for the determination of general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with responsibility. The majority further states that the fact that the documents requested in the Motion pertain to the smuggling of arms to Tuzla and Bihać, and do not explicitly mention their delivery to Srebrenica, does not alter the Chamber's view, and that it is conceivable that the Accused will need these documents, which are essentially concerned with the quantity of and the way in which the arms were allegedly smuggled into Srebrenica, in order to provide the Chamber with credible arguments relating to the extent to which the inhabitants of Srebrenica were armed and the enclave was demilitarised.<sup>6</sup>

4. While I agree with the majority that the Accused's state of mind about the events in Srebrenica and the general requirements of the crimes against humanity are important issues in this case, I cannot agree with the majority on the finding that documents related to the alleged smuggling of arms into BiH are relevant to and necessary for the determination of those issues.

5. I first recall the Appeals Chamber ruling that "the exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign states (under customary international law, states, as a matter of principle, cannot be 'ordered' either by other states or by international bodies)".<sup>7</sup> It also stated that "any time a state fails to fulfil its obligation under Article 29, thereby preventing the International Tribunal from discharging the mission entrusted to it by the Security Council, the International Tribunal is entitled to report this non-observance to the Security Council" and that this power has been incorporated into Rule 7 *bis*.<sup>8</sup> Bearing in mind this unique nature of binding orders and the awesome power the Tribunal is vested with, I am of the view that binding orders should not be issued lightly. In order to compel a sovereign state to produce certain documents, the documents must be clearly relevant to the issues in this case. I further note that the Appeals Chamber has held that Rule 54 *bis* orders are "reserved for cases in which they are really necessary".<sup>9</sup>

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<sup>6</sup> *See supra* para. 22.

<sup>7</sup> *Blaškić* Review, para. 26.

<sup>8</sup> *Blaškić* Review, paras. 33–34.

<sup>9</sup> *Milutinović* US Decision, para. 27; *Blaškić* Review, para. 31.

6. In the present case, in my view, whether or not arms were smuggled into BiH, by whom or through which route or by what method, or what kind of, or how many, arms were smuggled in has no relevance to the matters which need to be taken into account in determining the charges of crimes against humanity or the state of mind of the Accused in relation to the events in Srebrenica. The issues that are relevant to the determination of the general requirements of the crimes against humanity would be (i) whether there was a predominantly civilian population in the enclave, (ii) whether there was an attack directed against the civilian population, and (iii) whether the underlying acts were committed as a part of such attack. However, these are totally separate matters from the existence of military forces inside the enclave and the extent of their armament, which are to be determined by the Trial Chamber based upon the evidence presented before it. Therefore, the specific circumstances regarding the delivery of arms into BiH are not relevant<sup>10</sup> or, if at all, only marginally relevant, to the above issue or the Accused's state of mind about the events in Srebrenica or to the determination of the general requirements of the crimes against humanity.<sup>11</sup>

7. Moreover, given the above concession by the Prosecution that (i) the Srebrenica enclave was in fact not demilitarised, (ii) attacks were launched against the Bosnian Serb forces and villages by the "Muslim forces" within the enclave, and that (iii) the military forces in Srebrenica were legitimate military targets, I do not find the requested documents necessary for the determination of these issues in this case.

8. Therefore, I do not find that the documents described in categories (i) to (iii) have met the requirements of relevance and necessity so as to warrant the Chamber to compel Germany to produce those documents. Further, with respect to the documents described in category (v), while I agree with the majority that the request is not specific enough, even if they were specific, I would not find the documents relevant to this case insofar as they concern the smuggling of arms into BiH.

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<sup>10</sup> Indeed, for instance, it would make no difference in the finding on whether there was an "attack on civilian population" if arms were smuggled in from third states or if they were manufactured inside the Srebrenica enclave.

<sup>11</sup> I note that the majority has also acknowledged that the requested documents are not clearly relevant to the issue in this case. In paragraph 22 of the decision, after noting that the requested documents in fact only pertain to the smuggling of arms to Tuzla and Bihać, and not to their onwards delivery to Srebrenica, the majority stated that "it is [only] *conceivable* that the Accused will need these documents, which are essentially concerned with the quantity of and the way in which the arms were allegedly smuggled into Srebrenica, in order to provide the Chamber with credible arguments relating to the extent to which the inhabitants of Srebrenica were armed and the enclave was demilitarised." [emphasis added].

9. The majority also finds that the issue of the UN personnel's involvement in arms smuggling is relevant to the Accused's case.

10. I agree with the majority that whether the victims of alleged hostage-taking have actively participated in hostilities, and the manner in which and the reasons why they were held are important issues in this case, and that the Chamber should take into account all the circumstances surrounding the alleged hostage-taking in determining this charge against the Accused.<sup>12</sup> However, I cannot relate any of the documents described in those categories to the issue concerning specific UN personnel taken as hostages. In my view, ordering Germany to provide these documents in the hope that it may reveal some useful information to the Accused regarding the people who were taken as hostages would be allowing a "fishing expedition."

11. Furthermore, I disagree with the majority's finding that the circumstances which should be considered "might include the Accused's state of mind in relation to this allegation and the question of whether arms smuggling, if proven, could potentially turn UN personnel into active participants in the hostilities", and its conclusion that the issue of [any] UN personnel's involvement in arms smuggling is relevant to this case.<sup>13</sup> I cannot see how establishing that some UN personnel were involved in arms smuggling to the BiH, could potentially change the status of UN personnel as a whole into active participants in the hostilities. As correctly pointed out by the Prosecution, what will be deemed relevant to this issue are documents concerning the activities of the specific UN personnel indicated in the Indictment as victims of hostage-taking, namely, the UN peacekeepers and military observers who were detained in various locations between approximately 26 May and 19 June 1995.<sup>14</sup>

12. Therefore, I again do not find that the documents described in categories (i) to (iii) have met the requirements of Rule 54 *bis* in this regard. As far as the documents described in the latter part of category (vii) are concerned, while I agree with the majority's finding on relevance to another matter as indicated in paragraph 38 of this decision, I disagree with the majority on the finding that

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<sup>12</sup> See *supra* paras. 25–27.

<sup>13</sup> See *supra* para. 27.

<sup>14</sup> The majority further finds that the documents regarding the UN personnel's involvement in arms smuggling "also go to what Germany admits *is* relevant, namely to whether there was a threat of force against the UN personnel detained *in order to make a third party, in this case NATO, behave in a certain way*", and that accordingly "the issue of UN personnel's involvement in arms smuggling bears relevance to the Accused's case." (*supra*, para. 27). However, I find it difficult to understand how the alleged involvement of UN personnel in arms smuggling would become relevant to the issue of whether there were threats issued against third parties including NATO. Furthermore, as I stated above, insofar as the documents do not concern specific UN personnel taken as hostages, I find them irrelevant and unnecessary for the purpose of this case.

the documents are relevant to the issue of UN personnel's involvement in arms smuggling, and thus to this case.<sup>15</sup>

13. For these reasons, I partially depart from the reasoning of the majority in relation to categories (v) and (vii), and I disagree with the reasoning and conclusion of the majority in relation to categories (i) to (iii). I would deny the Motion in relation to categories (i) to (iii).

Done in English and French, the English text being authoritative.



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O-Gon Kwon

Judge

Dated this nineteenth day of May 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>15</sup> While the majority finds the documents of this category relevant to this case because they are related to the issue of smuggling of arms into BiH as well, the reasons why I cannot agree with this have been stated in paragraphs 5–8 of my partially dissenting opinion.